

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: June 30, 1998

TO : James S. Scott, Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Yoshi's Nitespot 506-2017-1700
Case 32-CA-16646 506-6050-2500
506-6090-5000

This Section 8(a)(1) and (3) case was submitted for advice as to whether two on-duty restaurant employees were engaged in protected activity when they stopped work for ten minutes to present complaints and demands regarding working conditions, in the company of off-duty employees and nonemployee Union supporters, to Employer officials in non-customer work areas of the Employer's restaurant.

FACTS

Yoshi's Nitespot (the Employer) is a restaurant and jazz club. Hotel Employees and Restaurant Employees Local 2850 (the Union) has been organizing the Employer's employees since October 1997. On November 10, 1997 a group of about 30 individuals, including employee organizing committee members, Union representatives, and others, met with Kaz Kajimura, one of the Employer's owners, and asked him to sign a neutrality agreement and to agree to a third-party card check if the Union requested recognition. Kajimura refused those requests. After a charge in Case 32-CA-16527 was filed on December 23, 1997 and amended January 7, 1998, the Region, on February 23, 1998, issued complaint alleging the Employer violated Section 8(a)(1) and (3) by threatening employees with closure if the Union got in, interrogating employees, and soliciting grievances and granting wage increases and other benefits in order to discourage employees from supporting the Union. That complaint seeks a remedial bargaining order remedy.

In the meantime, during a February 16, 1998 Union organizing committee meeting, the committee decided to take a "job action" at the Employer's restaurant at 9:00 p.m.

the following Friday, February 20, the busiest night of the week for the Employer's business. The committee wanted to present work-related complaints to owner Kajimura. On that Friday night a group of 8-10 people, including a Union organizer, off duty employees and nonemployee Union supporters, assembled in the restaurant's lounge area and went to the office at the rear of the restaurant, where they expected to find Kajimura. Three on-duty employees (Kupers, Estow and Trotter), who were members of the organizing committee, stopped work and met the group in the five-foot wide hallway outside the office, which also contained the wait station for computerized order entry and for drinks. The group was visible down the hall from the restaurant seating area.

A restaurant manager came over and asked who the group was, since he states that he recognized only two individuals (the on-duty employees Kupers and Estow).¹ When one of the individuals responded that they were with the Union, the manager states that he asked Kupers who gave Kupers the right to bring Union people into the wait station area. The manager states that Kupers responded by giving the manager a piece of paper and asking the manager to read it.² Kupers states only that the manager, who was with the group when Kupers arrived, told the on-duty employees to return to work. After the group learned that Kajimura was not at the restaurant, and after standing in front of the office for 4-5 minutes, the group decided to go through the back hallway into the kitchen where another owner was working preparing food.

The group congregated in a corner of the kitchen near where that owner was working and two on-duty employees (Estow and Trotter) and an off-duty employee took turns reading portions of a seventeen-line statement raising certain concerns regarding working conditions and demanding

¹ The manger states he learned later that evening that on-duty employee Trotter also participated in the conduct, but the manager did not tell owner Kajimura the next day.

² The manager did not read the paper at that time. The paper stated that employees had a right to stop work briefly to attempt to meet with management to demand improvements in wages and hours.

that management take certain actions, including recognizing the Union. The group then dispersed; the on-duty employees returned to work, while the others left the restaurant. Estow and Kupers estimate they were gone from their work for at most 10 minutes; the manager estimates that the group was in the restaurant for about 15 minutes.

On February 26, owner Kajimura gave Kupers and Estow written warnings stating:

I found it very regrettable that you participated in the incident which took place during the peak business period in the dining room, the kitchen and the bar in the evening of Friday, Feb. 20, involving some Yoshi's staff members and a host of outside union people. The actions by you and your friends severely disrupted our business. This is a warning that Yoshi's does not tolerate any disruptive activities to the normal course of business and that your future participation will be a cause for immediate dismissal.

The Employer also posted a similar notice addressed to the entire staff.

The investigation revealed that the activity on February 20 did have some impact on Employer operations, since Kupers was working as an "expediter" and thus his 10-minute absence slowed the movement of food out of the kitchen; Estow was working as a waiter, and that his absence would "inevitably" have some impact on the service of customers in his section;³ and that the presence of the group first in the hallway containing the wait station and then in the kitchen arguably interfered at least to some degree in the functioning of those areas. The Region views the overall impact on the Employer's operations, in terms of the Employer's ability to serve customers, as "slight."

ACTION

We conclude that the concerted conduct for which Kupers and Estow were warned, their "participation" in the "disruption" of the Employer's business, resulted from

³ The manager states he assigned a busperson to cover Kupers' duties, while he himself saw if anything needed to be done in Estow's section.

their protected conduct of stopping work for ten minutes and of gathering to present work-related grievances and demands to Employer officials.

Employees, particularly unrepresented employees without a formal grievance procedure, participate in protected activity when they concertedly engage in brief work stoppages to present grievances, complaints or demands to representatives of their employer.⁴ Such in-plant work stoppages which are "peaceful, focused on several specific job-related complaints, and [cause] little disruption of production by those who continued to work" are protected for "a reasonable period of time", but may lose protected status if unreasonably continued.⁵ Further, a "demonstration" in the public areas of a retail establishment, specifically a restaurant, has been found to constitute unprotected activity even when it accompanied the presentation of demands to an employer in nonpublic areas.⁶ The Board in Horikawa applied by analogy the cases

⁴ See, e.g., Larand Leisurelies, Inc., 213 NLRB 197, 203 (1974), enf'd. 523 F.2d 814 (6th Cir. 1975) (protected for 40-120 employees to accompany union agent during working time to employer office to demand recognition, then chanting about the union; absent from work for 30 minutes); Johnnie Johnson Tire Co., Inc., 271 NLRB 293, 294-95 (1984), enf'd. unpub. op. 120 LRRM 2504 (5th Cir. 1985) ("concerted activity by nonrepresented employees to protest their working conditions is normally held to be protected regardless of the time of day it occurs or the impact of such activity on production"; 10-minute work stoppage to see manager about previously announced wage cut, resulting in lost production, was still protected).

⁵ Cambro Mfg. Co., 312 NLRB 634, 636 (1993) (employer did not violate the Act in discharging employees who remained in facility, including work areas, for several hours after being told to either return to work or to vacate the facility).

⁶ G.T.A. Enterprises, Inc. d/b/a "Restaurant Horikawa", 260 NLRB 197 (1982).

allowing retail establishments to impose no-solicitation rules "in areas frequented by customers", 260 NLRB at 198.⁷

Here, Kupers and Estow were warned for "participating" in the incident which "disrupted" the Employer's business.⁸ The "incident" was the presentation of grievances and demands to an Employer owner in nonpublic areas of the Employer's facility. Neither the employees nor the other participants "demonstrated" while they transited the public areas of the restaurant on the way to and from the nonpublic areas of the restaurant where they sought first unsuccessfully to meet with owner Kajimura, and secondly when they read their brief demands to another owner in the kitchen before leaving peacefully.⁹ The group, including Kupers and Estow, did not attempt to "achieve recognition by physical intimidation".¹⁰ The conduct in presenting demands to the Employer, as well as the "slight" disruption to the Employer's ability to serve customers through either

⁷ See also Saddle West Restaurant, 269 NLRB 1027, 1042-43 (1984) (in retail establishments including restaurants, broad proscriptions of concerted activity "within those particular 'areas' where patrons" of the establishment may be present should be statutorily forbidden).

⁸ [FOIA Exemptions 6, 7(C), and 7(D)]
one of the two reasons Kupers and Estow were warned is that they were on the clock at the time of the incident and that their activities interfered with the job duties of other employees and disrupted the normal functioning of both the kitchen and the restaurant.

⁹ Compare Horikawa, 260 NLRB at 197-98 (group of 30 people "marched" and "pushed their way" through reception area where people were waiting to be seated and through restaurant on way both to and from offices at rear of restaurant, chanting in a "noisy manner" in both directions).

¹⁰ Compare Burger King Corporation, 265 NLRB 1507, 1509-10 (1982), enf.denied on other grounds 725 F.2d 1053 (6th Cir. 1984) (group proceeded to office, physically trapped manager and assistant in office while chanting and refusing to leave, causing closure of restaurant).

the presence of the group in traffic areas in the kitchen and wait station or Kuper and Estow's 10-minute work stoppage, did not take place in the public customer area of the restaurant.¹¹ As such, the restraints on conduct in retail establishment "public areas" applied to the disruption in Horikawa do not appear to apply here, but rather the general principles protecting brief "work stoppages" to present work-related demands despite some impact on employer "production."¹² The "interference with production" caused by any short-term difficulties in access to the wait station or kitchen appears merely incidental to the presence of the group of employees and others attempting to present their brief list of grievances and demands, first to Kajimura and then, in his absence, to the other owner in the kitchen. Accordingly, we would find the concerted conduct for which Kupers and Estow were warned to have also been protected under Section 7.

The Employer asserts that another reason for the warnings was because Kupers and Estow "had led a group of employees into areas not open to the public - the kitchen and the wait area". It is not clear that it would be protected activity for an on-duty employee to "lead" nonemployees into working areas of an employer's facility during working time.¹³ However, the Employer's warning letter makes no mention of this reason and instead focuses only on the protected conduct. Therefore, we would argue that this is a post-discharge justification for the Employer's unlawful actions. In addition, we note that the Employer's club manager identified one of the off-duty

¹¹ We note again that Kuper's expediter position was in the kitchen, and the manager attempted to cover the needs of the patrons in waiter Estow's section.

¹² See Johnnie Johnson Tire Co., Inc. and Cambro Mfg. Co., supra.

¹³ Compare Earle Industries, Inc., 315 NLRB 310, 313-315 (1994), enf. denied 75 F.3d 400 (8th Cir. 1996) (employee was engaged in protected activity when she encouraged a nonemployee, during nonworking time and in a nonworking area, to proceed through the plant to the employer's front office).

employees in the group of nonemployees the Union organizer led to the back of the restaurant, yet that off-duty employee (who did not cease work) was not disciplined. We also note the Region's apparent conclusion that Kupers and Estow did not "lead" the group of nonemployees to the hallway outside the office, but instead met the group there.¹⁴

In all these circumstances, we conclude that Kupers and Estow were disciplined for their concerted protected activity of briefly stopping work to present grievances and demands to the Employer.

B.J.K.

¹⁴ The basis is unclear for the Region's statement that "one of the on-duty employees then led the group into the kitchen", since neither [FOIA Exemptions 6, 7(C), and 7(D)] who led the group from the hallway outside the office into the kitchen. [FOIA Exemptions 6, 7(C), and 7(D)] the whole group then walked toward the kitchen; [FOIA Exemptions 6, 7(C), and 7(D)] Teng told him apparently [Kupers and Estow] led the group through the wait station into the kitchen.